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IN THE

# Supreme Court of the United States

October Term, 1960

No. 871

In the Matter

of the

Petition of MOORE-McCORMACK LINES, INC., as owner of S.S. MORMACKITE for exoneration from or limitation of liability,

MOORE-McCORMACK LINES, INC.,

*Petitioner.*

ARMCO STEEL CORPORATION, WESSEL, DUVAL & CO., INC., JEAN O. RICHARDSON, Executrix Under the Last Will and Testament of HAROLD R. RICHARDSON, *et al.*,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Moore-McCormack Lines, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered November 30, 1959.

### Citations to Opinions Below

The District Court opinion is reported at 164 F. Supp. 198. The Court of Appeals opinion, and decision denying

our petition for rehearing, are reported at 272 F. 2d 873 and printed *infra*, Appendix B, pages 14-26. The decisions denying both petitions for rehearing *en banc* are not reported; they are printed *infra*, Appendix B, pages 27-28. The decision denying Armco's and Wessel's petition is not yet reported but is printed *infra*, Appendix B, pages 29-31.

## Jurisdiction

The judgment of the Court of Appeals was entered on November 30, 1959. Rehearing was denied to petitioner December 31, 1959. Petitioner's time to apply for certiorari was extended to and including April 18, 1960 by order of Mr. Justice Harlan, dated March 23, 1960.

The jurisdiction of this Court is invoked under 28 U. S. Code §1254.

## Questions Presented

1. Where a vessel, after proceeding safely for 13 days of a 15-day voyage, capsizes on the 14th day in a storm, while being navigated in such manner as could account for her capsizing, is there an "inescapable inference" against the shipowner that the stowage of the ship was unseaworthy when she sailed and that this caused her to capsize?

2. Does the Jones Act make a shipowner liable in full to the estate of a chief mate for his injuries and death sustained upon the capsizing of his ship due to improper stowage of her cargo, although he directed the stowage in a manner contrary to the express directions of the shipowner?

## Statutes Involved

The statutes involved are the Limitation Act, 46 U. S. C. §§181-189, and the Federal Employers' Liability Act, 45 U. S. C. §§51-60, made applicable to seamen by the Jones Act, 46 U. S. C. §688. Applicable sections are reproduced in Appendix A *infra*, pages 11-13.

## Statement

In September, 1954, petitioner's steamship MORMACKITE loaded 9003 tons of iron ore at Vitoria, Brazil, the stowage being directed by Richardson, the Chief Mate. On September 25, she sailed for Baltimore and proceeded without incident until October 7 when, off Cape Hatteras, she ran into a fresh gale with heavy seas which caused her to roll violently. When the heavy weather was encountered, speed was reduced, as prudent navigation requires, and she continued at slow speed without difficulty for 4 to 5 hours. Then, at the height of the storm, speed was increased to full ahead. There was no evidence of any excuse for doing so. Within a few minutes she rolled heavily to port, shifting her cargo and causing a heavy list. Speed was again decreased, but it was too late. Thereafter, as she rolled, the ore continued to shift and within an hour she rolled over and sank. Only 11 seamen survived.

Petitioner instituted this limitation of liability proceeding and settled many of the claims. The remaining respondents are the cargo owners, 7 survivors, and the representatives of 5 deceased officers and seamen, including the Chief Mate. Cargo damages are stipulated to be $136,658.76. The District Court has found the damages of the remaining respondents to be $736,329, including $178,861 for the estate of the Chief Mate.

The District Court found that the vessel was equipped with a defective "stabilogauge" (an instrument used to calculate ship stability) and inferred from this that the officers had been misled into believing that the vessel had more stability than she had and therefore must have stowed the ore (badly) accordingly. Although the Court accepted respondents' testimony that the weather was bad and that speed was increased at the height of the storm, and although there was no evidence that the vessel had been ballasted to compensate for consumption of fuel and water to maintain initial stability, the Court drew an "inescapable" inference from the shifting of the ore on October 7 that the vessel was unseaworthy as to stowage when she sailed on September 25. Petitioner was held liable for such unseaworthiness.

The District Court denied limitation of liability as to death and injury claims because it found that petitioner's managing agents were privy to the defect in the stabilogauge and because the master had actual knowledge of bad stowage. The District Court denied limitation as to the cargo claimants on the former ground only—under the statute the master's privity or knowledge does not deprive the shipowner of the right to limit liability as to property damage claims, but only as to claims for death and injury.

The Court of Appeals reversed as to the "stabilogauge" and held that the instrument was not defective. Nevertheless it held that the sinking itself compelled the inference that the stowage was bad. It therefore held petitioner liable to all respondents but granted limitation as to cargo claimants.

In its decision, the Court ignored petitioner's argument, seriously pressed, and affirmed the District Court's award

of full recovery for the death of the Chief Mate despite his culpable participation in the stowage which, as the Court found, violated petitioner's directives. When the point was again made on petition for rehearing, it was again rejected without discussion (Appendix B *infra*, p. 26).

## Reasons for Granting the Writ

**A.** ***As to the first question:***

1. The decision below conflicts with the decision of the Court of Appeals for the Third Circuit in *The Transit*, 250 Fed. 71. There it was said,

> "Nor do we think there is substance in the libelant's claim to recovery in the presumption of the vessel's unseaworthiness. Such a presumption necessarily arises and alone will sustain recovery in a case where a vessel sinks from an unknown cause under circumstances where she had been subjected to no external peril, and where nothing but her unseaworthiness can explain the accident. In other words, the presumption of unseaworthiness arises where the only inference in the circumstances is that of unseaworthiness. [Citations.] As the circumstances attending the sinking of the 'Transit' do not exclude all inferable causes except that of unseaworthiness, but, on the contrary, very plausibly suggest another cause, the presumption does not exist" (p. 72).

So, in this case, the vessel had been subjected to an "external peril"—a severe storm. The circumstances "plausibly suggest another cause"—the increase of speed to full ahead. If lack of stability contributed to the loss, such lack

may be as plausibly attributed to a possible failure to ballast the vessel's tanks to compensate for consumption of fuel and water on the voyage as to the manner in which she was loaded.

2. The decision conflicts with that of the Court of Appeals for the Ninth Circuit in *The South Coast*, 71 F. 2d 891, cert. den. 293 U. S. 627. That Court said,

> "If the facts of appellants' case had met the requirements that nothing but unseaworthiness of the vessel could explain the accident, the argument indulged in might be more persuasive, but here we have other equally strong possibilities and presumptions. • • •
>
> "Some of the cases cited by appellant are to the effect that where a vessel in calm weather at the beginning of a voyage, without reasonable explanation, from undiscovered causes sinks, a presumption of unseaworthiness arises where nothing but unseaworthiness can explain the accident. In re Eastern Transp. Co. (The Calvert) (D. C. Md.) 37 F. (2d) 355, 363. In Oregon Round Lumber Co. v. Portland, etc. S.S. Co. et al. (D. C. Or.), 162 F. 912, 920, also a case cited by appellant, this doctrine is summarized as follows: • • • • It not infrequently transpires that a vessel, after entering upon her voyage or engaging in the service for which she is dispatched, becomes unseaworthy, and damage ensues, without any apparent cause from stress of weather or collision in any way, or undue or negligent abuse in handling and navigating her, and in every such case the presumption obtains that she was unseaworthy at the time of entering upon her service. • • •'

> "In this case the evidence shows that there were adverse conditions of weather, of current and dangerous reefs, and there is no evidence how the vessel was being handled. Indeed, appellants' assumption that an explosion occurred might involve another equally plausible assumption that some one was negligent, and that the vessel was not 'being properly handled.'"

The MORMACKITE also met "adverse conditions of weather." The circumstances of her sinking affirmatively show that she was not "being properly handled."

3. The decision conflicts with the prior decision of the same Court, as well as the decision of this Court, in *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 114 F. 2d 248, aff'd 314 U. S. 104. There, in contrast with the present case, the Court painstakingly reviewed the history of the doctrine and held that unseaworthiness at the beginning of a voyage is inferred only "if a vessel became unfit shortly after she broke ground and no explanation was offered" (251). Here, there was no difficulty until almost the end of the voyage and an explanation was proved by the testimony of the very survivors who are claiming damages.

4. The question is important because it radically alters a rule of admiralty law on which the circuits have heretofore been in close agreement. By its very nature, the rule applies particularly to catastrophes involving numerous claims and very large sums of money. Litigation of all such catastrophes would consume much time and effort of the Courts. Until the rule is finally determined by this Court, its unsettled status is bound to promote litigation and discourage settlements.

**B. *As to the second question:***

1. The decision below conflicts with this Court's decision in *Great Northern R. Co.* v. *Wiles*, 240 U. S. 444. In that case, the brakeman of a freight train was killed when, contrary to the railroad's rules, he failed to warn a following train that his train had stopped. This Court held that since he had violated "a duty not only to himself but to others," his estate was barred from all recovery. In the present case, the same F. E. L. A. is involved (incorporated by the Jones Act), and the facts are indistinguishable. Richardson, the Chief Mate, loaded the MORMACKITE in a manner which the Court below has found to have been both dangerous and in violation of petitioner's instructions.

2. The decision conflicts with a prior decision of the same Court, *Walker* v. *Lykes Brothers S.S. Co.*, 193 F. 2d 772. There, the master of a ship, injured when the drawer of a filing cabinet opened suddenly and struck him, was denied recovery because he had violated his duty to keep the ship in good repair. The same Court later described this as a "firmly established" rule. *Dixon* v. *United States*, 219 F. 2d 10, 16. In the present case, the panel ignored the point although it was vigorously urged. Subsequently, however, in *Dunbar* v. *Henry Du Bois' Sons Co., Inc.* (2/10/60—not yet reported—opinion reproduced, Appendix B, pp. 33-40), another panel of the Court held that the estate of the captain of a derrick barge was entitled to a (reduced) recovery although his negligent failure to pump had been a cause of the sinking of his boat. One judge (Hincks, *J.*) of the panel distinguished *Walker* on the facts. Another (Waterman, *J.*) said that *Walker* was erroneous, but only a dictum. The third (Clark, *J.*) apparently believed that *Walker* was indistinguishable, but said that one panel could disregard another panel's deci-

sion. The first two did not sit on the MORMACKITE panel; the third did. The barge owner petitioned for rehearing *en banc*, but the petition was denied without opinion.

3. The correct application of *Walker* has been a matter of conflict among the other maritime circuits. As was said in *Dunbar, supra.*

> "Efforts made by other circuits to distinguish the *Walker* case have not been particularly successful. The Fourth Circuit has construed *Walker* as applying only to masters of oceangoing vessels on long voyages. See *Mason* v. *Lynch Brothers Co.*, 228 F. 2d 709, 712 (4 Cir. 1956); *Spero* v. *Steamship The Argodon*, 150 F. Supp. 1 (E. D. Va. 1957). However, as we have pointed out in *Dixon* v. *United States*, 219 F. 2d 10, 16 (2 Cir. 1955), the rationale of the *Walker* doctrine applies generally to a breach of contractual duty by an employee and does not depend upon the rank of the employee or the class of the vessel or the length of the voyage. We regard the Fourth Circuit's interpretation as a courteous method of escaping the consequences of the *Walker* doctrine without overtly repudiating an opinion of this court. The Sixth Circuit in *Chesapeake & Ohio Railway Company* v. *Newman*, 243 F. 2d 804, 808 (6 Cir. 1957), interpreted *Walker* as precluding recovery only when the breach of the contractual duty the employee owed the employer was 'the sole and proximate cause' of the employee's injury. But this Sixth Circuit effort to avoid express repudiation of *Walker* is as fruitless as that of the Fourth Circuit. If the employee's negligence was the sole and proximate cause of the injury, it is of no moment that this negligence constituted a breach of some contractual duty" (Appendix B, *infra*, p. 37, footnote).

4. The importance of the question is demonstrated by the frequency with which *Walker* has been debated. Only the intervention of this Court will resolve the conflict within the Second Circuit and between that Circuit and the other maritime Circuits.

## CONCLUSION

**For the foregoing reasons, this petition for a writ of certiorari should be granted.**

Dated: New York, New York
April 14, 1960.

Respectfully submitted,

EUGENE UNDERWOOD
HERVEY C. ALLEN
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*Counsel for Petitioner*

# APPENDIX A

## Statutes Involved

LIMITATION OF SHIPOWNERS' LIABILITY ACT (46 U. S. C. §183):

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: *Provided*, That there shall not be included in such

tonnage any space occupied by seamen or apprentices and appropriated to their use.

* * * * *

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

* * * * *

JONES ACT (46 U. S. C. §688):

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. * * *

FEDERAL EMPLOYERS' LIABILITY ACT (45 U. S. C. §§51, 53):

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee to his or her personal

representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. • • •

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; • • •

## APPENDIX B

### Opinions and Judgment Below

### Opinion of the Court of Appeals

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 69—October Term, 1959.

(Argued October 16, 1959 Decided November 30, 1959.)

Docket No. 25329

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MOORE-MCCORMACK LINES, INC.,

*Petitioner-Appellant,*

—v.—

ARMCO STEEL CORPORATION, WESSEL, DUVAL & CO., INC., *et al.*,

*Claimants-Appellees.*

---

MOORE-MCCORMACK LINES, INC.,

*Cross-Libellant-Appellant,*

—v.—

LUISA V. WALL, as administratrix of the goods, etc., of Edward T. Wall, deceased,

*Respondent-Appellee.*

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In the Matter

of

The Petition of MOORE-MCCORMACK LINES, INC., as owner of Steamship Mormackite, for exoneration from or limitation of liability.

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MOORE-MCCORMACK LINES, INC.,

*Cross-Libellant-Appellant,*

—v.—

JEAN O. RICHARDSON, as executrix under the last will and testament of Harold R. Richardson, deceased,

*Respondent-Appellee.*

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Before:

CLARK, HAND, *Circuit Judges*
and SMITH, *District Judge.*

---

On appeal by the petitioner from a judgment of the District Court for the Southern District of New York, McGohey, *J.*, presiding, dismissing its petition for exoneration from, or limitation of, liability for the loss of life and cargo on its vessel, "Mormackite," sunk off Cape Hatteras on the morning of October 7, 1954.

---

EUGENE UNDERWOOD, *for the appellant.*

HENRY N. LONGELY, *for the appellees.*

---

HAND, *Circuit Judge*:

The Moore-McCormack Lines, Inc., the owner of the steamer, "Mormackite," appeals from a judgment of the District Court denying its petition for exoneration from, or limitation of, liability for the loss of life and cargo when its vessel, the "Mormackite," sank off Cape Hatteras on the morning of October 7, 1954 with the loss of her cargo of iron ore and a parcel of cocoa beans, together with that of thirty-seven (37) of the ship's company, including her master, chief mate and chief engineer. The survivors, eleven (11) members of the crew, the personal representatives of the estates of those lost, and the owners of the cargo filed claims against Moore-McCormack Lines, Inc., and that company filed cross-libels against the master, chief mate and chief engineer of the ship for negligent navigation. After a long trial Judge McGohey granted judgment against the owner without limitation in favor of the survivors, the personal representatives of those lost, and the cargo claimants, and dismissed the cross-libels. The issues in the case are whether the stowage of the "Mormackite" was seaworthy, whether her navigation preceding the loss was proper, and whether, if the stowage was unseaworthy, the owner may limit its liability for either the cargo or loss of life under §183(a) of Title 46, U. S. Code.

The findings are that the ship had been laden at Vitoria, Brazil, which port she left on September 25th, and "proceeded without untoward incident" until on October 7th "shortly after 4 a.m. heavy seas struck the vessel's starboard side, rolling her very hard to port about 20 to 25 degrees. The ore shifted. • • • The vessel took a port list. Her speed was reduced at once," and shortly thereafter the list was so far corrected she had only a little list to port. "Heavier seas were still coming from star-

board. Some time after 8:30 there was another very violent roll to port. The ore shifted heavily again. • • • The shifting continued. The vessel took a severe port list. • • • The list increased steadily. Chief Officer Richardson and Chief Engineer Wall were then seen attaching fire hoses to the sounding pipes leading to the starboard deep tanks." "At or after 8:30 the speed had increased"; and at about the time of the violent roll "the speed indicator • • • registered 'full speed.'" "However, the next telegraph order from the bridge was 'full stop; • • • every moment it was changing.'" The master on the bridge was "ordering 'right wheel amidships—he was trying to right the ship.'" "At 8:30 the vessel still had a port list which resulted from the first shift of cargo at 4 o'clock. And, despite the fact that she had been on reduced speed since 4 o'clock, she was nevertheless rolling hard. And the seas hitting her starboard were heavier than before. It is obvious that, in order to avoid a further shift of the ore a change of course was necessary. It is clear that this is just what Captain McMahon was trying to do." He may have been "trying to put her about and thus cause some of the ore to shift away from port to starboard." "The cargo pumps were put into operation after the 8:30 list."

Upon these findings McGohey, *J.* found that the stowage was unseaworthy. It is not clear whether he would have so found, had there been no evidence as to the stowage itself; but upon that highly disputed issue he found that "the ore was stowed as indicated on the stowage plan, Claimant's Exhibit 4: that is, the ore in No. 1 lower hold was piled up through the hatch into No. 1 lower 'tween-deck; in No. 3 and 5 lower 'tweendecks the ore was piled up through the hatches in to the upper 'tweendecks." He also found by inference which we accept, that the master knew how the ore was stowed when the ship broke ground.

If his conclusions were not "clearly erroneous," it would follow that for the personal injuries and deaths of the ship's company the petitioner was liable without limitation. §183(e) Title 46, U. S. Code.

The seaworthiness of the stowage depended first upon how it was put on board at Vitoria and whether that was in accordance with proper maritime practice. As has already appeared, the finding was that the ore was deposited in piles whose tops extended through the hatches in three instances. The ore had lain in piles ashore, near where the ship lay, from which it was dumped upon a "conveyor belt" which moved perpendicular to the ship's side. This "belt" carried a "chute" which could be manipulated so as to discharge ore at varying angles into any of the hatches. The claimants argue that without hand trimming this necessarily resulted in stowing the ore in conical heaps which were apt to shift as the ship rolled. The ship answered that the chutes could deliver the ore at an angle and fill the hold, or 'tweendeck, so as to reach its sides and bulkheads in heaps not conical and therefore not likely to shift. Furthermore she put in evidence that the practice had been common at Vitoria to stow ore in this way, and that only in one instance had a cargo shifted that had been similarly stowed. Her expert witness, Wilson, testified that this method was safe. Moreover, although four or five of the survivors swore that the ore in the holds had lain in heaps and had extended through the hatches, some of these had stated upon examination by the Coast Guard they had not observed such stowage of the ore.

We do not think that the evidence was such as would permit our disturbing the judge's finding on the facts. That the survivors' testimony was inconsistent was of course to be considered; but it was not conclusive, especially

since the judge had seen the witnesses. Again we cannot say that the judge should have accepted the opinions of the ship's experts in preference to that of Manning, the claimants' expert who condemned the stow. The outstanding fact is that in seasonable weather the ore did shift and in the end capsized the ship. As McGohey, *J.* put it, the "inference is inescapable, I think, that she was unseaworthy as to her stowage." When to this we add the almost inevitable conclusion that when she broke ground her master must have seen the stow, the denial of limitation follows; or at any rate we should not be warranted in holding that the findings were "clearly erroneous."

Other considerations apply to the claims of the cargo. A shipowner may limit his liability for cargo loss under §183(a) of Title 46 only in case he proves that the loss was "without" his "privity or knowledge." In the case at bar the owner was a corporation, and it must be owned that it is hard to say from the books who are the officers whose "privity or knowledge" will charge the corporation, except that they must apparently be "the managing officers" (*Craig* v. *Continental Insurance Co.*, 141 U. S. 638, 646), whatever that may mean. In the case at bar it appears to be common ground that only notice to the following four of the corporation's officers would deprive it of its right to limit: Furey, Chief of Operations, Mayo, Marine Superintendent, Barrett, Assistant Marine Superintendent, and O'Brien, Operations Manager. It does not appear that Claimants' Exhibit 4 came to the notice of any of these men before the ship broke ground at Vitoria. Nor do we think that the evidence would have justified a finding, if the judge had made one (which he did not), that the practice of stowing ore, as the "Mormackite" was stowed, had become so uniform as to charge these officers with knowledge; or that they, or at any rate Barrett, must have

known that it had been so stowed. We do not say that there can never be such "negligence" of a "managing officer" of a corporation as will establish "privity or knowledge" of the owner under §183(a); indeed we have said otherwise, *Great Atlantic & Pacific Tea Co.* v. *Basileiro*, 159 F. 2d 661, 664, but in the case at bar Moore-McCormack Lines, Inc., had issued regulations, among which one (OV 34c II), provided that the "usual chuting of ore into a vessel which results in a conical pile may be acceptable practice for specially constructed ore-carriers, but can cause considerable damage to vessels constructed to carry general cargo." Another regulation (OV 34c III), provided: "We have had vessels where the ore was stowed in single conical piles • • • and some of these ships have made passages without damage; with others the top of the cone has rolled down • • • and in one case has given a list which required the Master to put into Halifax to re-trim his ship." As was obviously necessary in foreign ports, it was left to those in charge to follow these directions, and if they failed, their failure did not charge the owner with "privity or knowledge." The situation was clearly within *La Bourgogne*, 210 U. S. 95, 126: "The petitioner having shown the promulgation of regulations for the conduct of its business, which exacted compliance by the captains of its vessels with the international rules, we think the burden of proving • • • a willful departure from their requirements was indulged in • • • was cast upon the claimants."

Indeed, McGohey, *J.*, did not charge the owner as to the cargo with privity or knowledge that it had been ill-stowed, but based his decision upon a finding that the "stabilogauge" used in stowing the ship had not been properly "calibrated." A "stabilogauge" is an instrument carried on cargo ships to determine their "stability"; that

is to say, to determine how much cargo they may safely carry and where it should be stowed. It has to be properly "calibrated" to the ship that is to be stowed: that is, it must be adjusted to the different carrying compartments and to the "free surface correction for tanks." One of the factors entering into the computation is the "light ship weight" and another is the "vertical center of gravity." The computation itself is exceedingly complicated. It does not appear that, when the ship was built and delivered to the government there was a "stabilogauge" on board, or, if so, how it was "calibrated." At that time her "light ship weight" was in fact 5328 tons. Barrett, the Assistant Marine Superintendent, in 1948 chose the "Mormackite" as a "key ship" of several ships (C2SB1s) for which to compute the stability, all being of one model. His computations were based upon a "stabilogauge" which had been delivered to Pier 32 of the stevedoring department, although the trial record does not show that this "stabilogauge" had ever been put on board the ship. Barrett computed the actual "light ship weight" of the ship in 1948 by adding to, and subtracting from, her "light ship weight" when built (5328 tons), any changes made thereafter. His figure of 4661 tons as her "light ship weight" in 1948 was correct. He then computed that in order to make the 1948 "stabilogauge" a reliable test of proper stowage all that was needed was to add to her cargo, as stowed, a supposititious 110 tons of "deck load."

Judge McGohey found that the record did not show that the ship carried a properly "calibrated" "stabilogauge," and that she was unseaworthy for that reason. He held that it was "possible and even probable" (that) "the stabilogauge which the petitioner furnished for the use of Captain McMahon and Chief Officer Richardson on the 'Mormackite' was calibrated to her original light ship weight

of 5380 tons and K G of 25.82 feet and they were sure to be misled in planning the stowage." This presupposes that some "stabilogauge" had been put on board the ship; and that accords with every probability. However, even assuming that there was a "stabilogauge" that had been put on in 1945 before Moore-McCormack Lines, Inc. bought her and that it had been "calibrated" to a "light ship weight" of 5380 tons, which nowhere appears, we can say with certainty that that was not the "stabilogauge" that was on the ship in 1954. This follows from a deposition of one, Kristal, which was not in record before Judge McGohey for reasons that will appear immediately. Kristal was the president of a company that made "stabilogauges" and he testified that on August 8, 1947, he had shipped to Moore-McCormack Lines, Inc., a "stabilogauge" "calibrated" for the "Mormackite" with a "light ship weight" of 4490 and a vertical center of gravity of 27.6 feet. It appears to us that it would be altogether unreasonable to suppose that this was not the "stabilogauge" that was later on board in 1948, whose "calibration" Barrett accepted after the supposititious increase in its recorded tonnage of 110 tons deck load. Barrett's computation of "light ship weight" in 1948 being concededly correct, with this added increase in cargo the "stabilogauge" was reliable, and the ship *pro tanto* seaworthy.

Kristal's deposition had been taken before the trial had ended, but the Moore-McCormack Lines, Inc. did not offer it in evidence until after the judge had filed his opinion. Perceiving the importance that the "stabilogauge" had assumed, the owner then offered it in evidence. Judge McGohey refused to receive it, and after the appeal had been taken the owner moved in this court to have it added to the record on appeal. This motion we denied, adding, however, the following comment: "appellant may of course

argue as to the claimed effect of the excluded evidence in presenting its appeal." We accept this as equivalent to treating the deposition as part of the record, reserving, however, to the claimants the privilege of contradicting it. The claimants in their brief have not suggested that they wish to do this, so that we understand that we are to decide the appeal as though the deposition were a part of the record. We conclude therefore that it now appears that the "Mormackite" was not unseaworthy so far as concerned her "stabilogauge."

It is not necessary to deal at length with the owner's argument that the disaster was caused by the bad navigation of the ship before the shift of cargo about 8:30 a.m. She was, as we have said, put at full speed for a time and the master attempted to change her course so that she should be out of the trough of the seas, or perhaps even to expose her port side to the seas. There was testimony that this was not permissible navigation in such an emergency, but there was also testimony the other way. It would be strange if there were any fixed methods that those in charge were bound to adopt. Moreover, the question was in any event one of fact, and we should not be warranted in holding it "clearly erroneous" for Judge McGohey to find that the ship's navigation was at fault.

Lastly, it is quite plain that Moore-McCormack Lines, Inc. did not warrant the stowage of the ship. The charter did indeed warrant that she was "tight, staunch and strong and in every way fitted for the voyage," but there was no warranty as to her stowage, especially on the return voyage. Moreover, the charter contained a provision that the bills of lading should be subject to the Carriage of Goods by Sea Act, and that provision would be ineffective unless there was a limitation of liability in the absence of privity or knowledge of the owner—§1308, Title 46.

After what we have already said, it is clear that the dismissal of the cross-libels against the chief mate and chief engineer was proper. The claim of the master's estate has been settled.

The judgment awarding unlimited damages for loss of life or personal injuries will be affirmed. The judgment awarding damages for loss of cargo will be affirmed, but with limited liability.

## Memorandum of Panel Denying Petitioner's Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 69—October Term, 1959.

(Petitions for rehearing filed December 14, 15, 1959
Decided December 31, 1959.)

Docket No. 25329

MOORE-McCORMACK LINES, INC.,

*Petitioner-Appellant,*

—v.—

ARMCO STEEL CORPORATION, WESSEL, DUVAL & CO., INC., *et al.*,

*Claimants-Appellees.*

MOORE-McCORMACK LINES, INC.,

*Cross-Libellant-Appellant,*

—v.—

LUISA V. WALL, as administratrix of the goods, etc., of Edward T. Wall, deceased,

*Respondent-Appellee.*

MOORE-MCCORMACK LINES, INC.,

*Cross-Libellant-Appellant,*

—v.—

JEAN O. RICHARDSON, as executrix under the last will and testament of Harold R. Richardson, deceased,

*Respondent-Appellee.*

In the Matter

—of—

The Petition of MOORE-MCCORMACK LINES, as owner of Steamship Mormackite, for exoneration from or limitation of liability.

Before:

CLARK, HAND, *Circuit Judges*
and SMITH, *District Judge.*

PER CURIAM:

The petition of the Moore-McCormack Lines, Inc. for a rehearing is denied, but the Line should file an answer to the petition of Armco Steel Corporation and others for rehearing on two questions: (1) whether the cause should be remanded to Judge McGohey to make a finding that Barrett warned the master of the amount to be "cranked" into the stabilogauge; and (2) whether the cause should be also remanded to take testimony and to make findings as to the truth of the facts stated in the deposition of Kristal.

## Memorandum en Banc Denying Petitioner's Petition for Rehearing en Banc

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

IN THE MATTER OF THE

Petition of MOORE-McCORMACK LINES, INC., as Owner of S.S. MORMACKITE, for exoneration from or limitation of liability.

Before:

LUMBARD, *Chief Judge;*
CLARK, WATERMAN, MOORE and FRIENDLY, *Circuit Judges.*

*On petition for rehearing en banc.*

BURLINGHAM, HUPPER & KENNEDY, New York, N. Y. (Eugene Underwood, Hervey C. Allen, Robert A. Feltner and George Harrington, Jr., on the brief), *for petitioner.*

The petition for rehearing en banc is denied.

J. E. L.
C. E. C.
S. R. W.
H. J. F.
*U.S.C.JJ.*

January 29, 1960

**Memorandum en Banc Denying Respondents' Petition for Rehearing en Banc**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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MOORE-MCCORMACK LINES, INC.,

—v.—

ARMCO STEEL CORP. and WESSEL DUVAL & CO.

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*Petition for Rehearing en Banc of Armco Steel Corp. and Wessel Duval & Co.*

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BIGHAM, ENGLAR, JONES & HOUSTON, New York, N. Y., *for petitioners.*

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The petitition for rehearing en banc is denied.

J. E. L.
C. E. C.
S. R. W.
L. P. M.
H. J. F.
*U.S.C.JJ.*

21 March 1960

## Memorandum of Panel Denying Respondents' Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 69—October Term, 1959.

(Petition filed December 15, 1959 Decided April 4, 1960.)

Docket No. 25329

MOORE-MCCORMACK LINES, INC.,

*Petitioner-Appellant,*

—v.—

ARMCO STEEL CORPORATION, WESSEL, DUVAL & CO., INC., *et al.*,

*Claimants-Appellees.*

Before:

L. HAND and CLARK, *Circuit Judges*, and
J. JOSEPH SMITH, *District Judge.*

*On claimants' petition for rehearing.*

BIGHAM, ENGLAR, JONES & HOUSTON, New York City (Henry N. Longley and John J. Martin, New York City, of counsel), *for claimants-appellees Armco Steel Corp. and Wessel, Duval & Co.*

BURLINGHAM, HUPPER & KENNEDY, New York City (Eugene Underwood, Hervey C. Allen, and Robert A. Feltner, New York City, of counsel), *for petitioner-appellant, Moore-McCormack Lines, Inc., in opposition.*

PER CURIAM:

Of the three points asserted by claimants on their petition for rehearing, the only one upon which we feel we can add to the discussion already had in our opinion is that relating to the use we made of the deposition of Robert M. Kristal, president of a company manufacturing stabilogauges. The trial court denied limitation of liability for cargo loss on the ground that the unseaworthy stowage was caused by an improperly calibrated stabilogauge which misled the ship's officers as to the proper distribution of cargo. This conclusion rested upon a finding that the stabilogauge was calibrated on the basis of the vessel's 1943 "light ship weight" and "vertical center of gravity," and did not reflect certain modifications which occurred in 1947. After the opinion was filed, the petitioner offered the Kristal deposition, taken sometime before trial, but not previously offered; this the trial judge rejected as too late. Since the deposition shows quite clearly on the basis of office records that the ship was furnished with a properly calibrated stabilogauge on August 8, 1947, we concluded that the trial court's finding was erroneous and granted limited liability for cargo loss.

Claimants now object to our reference to the deposition and urge that at least the issue should have been returned to the trial judge for further hearing with cross-examination of Kristal and new findings. But they do not say how further cross-examination beyond that already had extensively by several counsel (including their own distinguished advocate) at the taking of the deposition can add to the already complete demonstration of the essential fact. Nor do they suggest the names of other witnesses or any further testimony they can produce as to the issue. Under the circumstances and particularly having in mind our power in admiralty to receive further evidence on ap-

peal, Admiralty Rule 45,[1] we have no question of our obligation to accept this clearly proven fact; and we think a return of the case for more trial now to gild the lily would be a useless and an undesirable formality in an admiralty cause already unfortunately too long drawn out.

Petitioner explains its failure to offer the deposition at trial by pointing out that extensive pre-trial and discovery procedures had disclosed no issue as to the stabilogauge and hence it was taken by surprise when the judge raised the issue in his opinion more than a year after the trial. Our reading of the record supports this claim of surprise and petitioner's prompt action thereafter to correct the error. But be that as it may, with a case which has traveled thus leisurely, and with the correcting facts now fully disclosed, we think justice requires that we act in knowledge of them.

Accordingly the petition is denied.

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HAND, *Circuit Judge*:

I do not challenge the power of an appellate admiralty court to receive evidence in addition to that taken in the district court, but it is a custom more honored in the breach than in the observance. While I have not much doubt as to the outcome of a hearing as to the presence of a proper "stabilogauge" in the ship, it does appear to me an undesirable precedent to take Kristal's deposition as conclusive. In spite of the added delay I should prefer to remand the issue for reconsideration by the District Court.

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[1] A power which should be accorded appellate courts more widely. Pound, Appellate Procedure in Civil Cases 262, 303-304, 368-369, 387-388 (1941); *Appeal and Error—New Evidence in the Appellate Court*, 56 Harv. L. Rev. 1313 (1943); Clark, Code Pleading 67, note 179 (2d Ed. 1947).

## Mandate of Court of Appeals

Ad. 183-274
Ad. 185-312
Ad. 185-313

HON. CHARLES E. CLARK
HON. LEARNED HAND
HON. J. JOSEPH SMITH.

Appeal from the Southern District Court for the Southern District of New York

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This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by Counsel. On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed in so far as it awarded unlimited damages for loss of life or personal injuries.

It is further ordered, adjudged and decreed that in so far as it awarded damages for loss of cargo, said decree be and it hereby is affirmed, but with limited liability in accordance with the opinion of this Court.

April 5, 1960

## Opinion of the Court of Appeals in *Dunbar* v. *DuBois*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 37—October Term, 1959.

(Argued November 5, 1959 Decided February 10, 1960.)

Docket No. 25589

HAZEL DUNBAR, as Administratrix under Limited Letters of the Estate of ROBERT DUNBAR, Deceased,

*Plaintiff-Appellee,*

—v.—

HENRY DUBOIS' SONS, CO., INC.,

*Defendant and Third-Party Plaintiff-Appellant,*

—v.—

BRONX TOWING LINE, INC.,

*Third-Party Defendant-Appellee.*

Before:

CLARK, HINCKS and WATERMAN,

*Circuit Judges.*

Appeal from orders of the United States District Court for the Southern District of New York, Ryan, *J.*, denying employer's motion for judgment n.o.v. in an action under the Jones Act, 46 U. S. C. 688, by administratrix of the estate of deceased employee, and dismissing employer's third-party action for indemnity brought against owner of tug towing vessel upon which deceased was employed. Order denying motion for judgment n.o.v. affirmed. Order dismissing third-party action reversed, and cause remanded.

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TASHOF & SOBLER and PAUL C. MATTHEWS (Paul C. Matthews, John J. Robinson, Edwin M. Bourke, of counsel), New York City, *for Plaintiff-Appellee.*

PURDY, LAMB & CATOGGIO (Vincent A. Catoggio, of counsel), New York City, *for Defendant and Third-Party Plaintiff-Appellant.*

FOLEY & MARTIN (John F. Quarto, of counsel), New York City, *for Third-Party Defendant-Appellee.*

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WATERMAN, *Circuit Judge:*

Plaintiff's intestate, Robert Dunbar, was a deckhand employed aboard the *Trenton*, a steam derrick incapable of self-propulsion used in dredging operations. On June 6, 1955, the *Trenton* completed an assignment in the East River. The *Trenton* was to be used the following morning in Hempstead Harbor on the north coast of Long Island. Dunbar was the only employee aboard the *Trenton* as it was towed that evening to Hempstead Harbor by the tug *Cortland*. Early the next morning as the tug was turning to enter that harbor the *Trenton* capsized and Dunbar was drowned.

Dunbar's wife, as administratrix of his estate, brought actions for wrongful death against DuBois, owner of the *Trenton* and appellant herein, and Bronx Towing, owner of the *Cortland*. The action against appellant was based upon the Jones Act, 46 U. S. C. 688. Appellant filed a third-party action for indemnity against Bronx Towing alleging that the accident resulted from the negligent operation of the *Cortland*. After presentation of the evidence, both appellant's third-party action and plaintiff's original action against Bronx Towing were dismissed. The dismissal of plaintiff's action against Bronx Towing is not contested on this appeal. The jury, although finding that Dunbar was 20 per cent negligent, returned a verdict on written interrogatories for $62,000. Appellant appeals from plaintiff's judgment against it in the wrongful death action and from the dismissal of its third party action against Bronx Towing.

## I

### *The Action for Wrongful Death Under the Jones Act.*

Plaintiff maintained that appellant was negligent in failing properly to caulk the *Trenton's* hull with the result that the *Trenton* capsized because of increased leakage when in tow. This contention was supported by substantial evidence adduced at trial. Appellant objects to various rulings of the trial court, but these objections are without merit. More serious is appellant's contention that, under the doctrine of *Walker* v. *Lykes Bros. S.S. Co.*, 193 F. 2d 772 (2 Cir. 1952), inasmuch as the jury found Dunbar to have been negligent, that finding operates as a complete bar to any recovery for his death.

*Walker* was an action under the Jones Act brought by the master of a vessel who had been injured when struck by a drawer of a steel filing cabinet, the drawers of which were defectively secured. There was evidence that the de-

fective condition of the cabinet was known to the master from the very beginning of the voyage, and that this condition could have been corrected, if not at sea, then certainly at ports of call visited in the interval between the beginning of the voyage and the occurrence of the accident. This court, Judges Swan, L. Hand and A. N. Hand, reversed judgment for the master and remanded for a new trial. The court indicated that if the jury should find that the master had negligently performed his supervisory duties, such a finding would operate as a complete bar to recovery. The court, by L. Hand, said:

> "We shall therefore accept the conventional rubric and think of contributory negligence as the breach of a duty to the wrongdoer. The important thing in situations like that at bar is to distinguish between such a duty, which the law imposes upon the injured person, regardles of any conscious assumption of a duty towards the wrongdoer, and a duty which the injured person has consciously assumed as a term of his employment. By 'contributory negligence' which results in no more than reducing the amount of an employee's recovery, the Act means the first; the second is a bar to any recovery." *Supra*, at 773.

Appellant argues that the *Walker* case should govern here to preclude plaintiff's recovery. Appellant points out that one of Dunbar's principal duties aboard the *Trenton* when in tow was to man the pumps should leakage occur. The argument continues that the jury, in returning a verdict for plaintiff, must have accepted appellant's contention that the *Trenton* capsized because of leakage resulting from improper caulking and that the jury's finding that Dunbar was 20 per cent negligent can only be based upon his failure to put the pumps to work. Thus appellant concludes

that Dunbar's breach of his contractual duty to man the pumps was a significant cause of the accident. Moreover, appellant suggests that Dunbar, the sole employee aboard the *Trenton*, might be regarded as its Chief Officer should such status be deemed essential in order to invoke the *Walker* doctrine.

We of this panel are in complete agreement that the statements made in the *Walker* opinion do not operate to bar recovery in the present case. Our reasons supporting this unanimity of result differ.

Judge Hincks believes that the present case is distinguishable from *Walker* upon its facts. At the time of the accident decedent had been on continuous duty for seventeen hours, and Judge Hincks points out that the jury might well have found that, though decedent was to some extent at fault in falling asleep and thus failing to man the pumps, the principal fault was the underlying failure by appellant to furnish an adequate crew. Judge Hincks concludes that *Walker* does not go so far as to hold that failure to remain alert under the circumstances here involved would constitute a breach of a "primary duty" in violation of a term of employment consciously assumed.

Judge Clark and I believe that the *Walker* doctrine is incompatible with the congressional mandate that contributory negligence and assumption of risk shall not bar a recovery in a Jones Act case.[1] See *Boat Dagny* v. *Todd*, 224

[1] Efforts made by other circuits to distinguish the *Walker* case have not been particularly successful. The Fourth Circuit has construed *Walker* as applying only to masters of oceangoing vessels on long voyages. See *Mason* v. *Lynch Brothers Co.*, 228 F. 2d 709, 712 (4 Cir. 1956); *Spero* v. *Steamship The Argodon*, 150 F. Supp. 1 (E. D. Va. 1957). However, as we have pointed out in *Dixon* v. *United States*, 219 F. 2d 10, 16 (2 Cir. 1955), the rationale of the *Walker* doctrine applies generally to a breach of contractual duty by an employee and does not depend upon the rank of the employee or the class of the vessel or the length of the voyage. We regard the Fourth Circuit's interpretation as a courteous

F. 2d 208, 211 (1 Cir. 1955). Judge Clark believes that in a proper case a panel of this court may frankly state its disagreement with a decision of another panel and refuse to be bound thereby. It is my position that the court in the *Walker* case expressly recognized and stated that the principles that courts have subsequently regarded as the "Walker doctrine" were not required to be enunciated in order to decide the issues then present before the court; and therefore whatever binding effect the holdings of one panel of a court may have upon a subsequent panel of the same court need not here concern us. Thus, although we reach our decision by different routes, the three members of this panel agree that the *Walker* doctrine does not require that we reverse the judgment below against appellant DuBois.

We affirm the judgment in the wrongful death action.

## II

### *Dismissal of the Third-Party Action.*

The district court dismissed appellant's third-party action against Bronx Towing, holding that *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282 (1952) foreclosed the indemnity action. In *Halcyon* the Supreme Court, confronted with a shipowner's claim against a stevedoring com-

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method of escaping the consequences of the *Walker* doctrine without overtly repudiating an opinion of this court. The Sixth Circuit in *Chesapeake & Ohio Railway Company* v. *Newman*, 243 F. 2d 804, 808 (6 Cir. 1957), interpreted *Walker* as precluding recovery only when the breach of the contractual duty the employee owed the employer was "the sole and proximate cause" of the employee's injury. But this Sixth Circuit effort to avoid express repudiation of *Walker* is as fruitless as that of the Fourth Circuit. If the employee's negligence was the sole and proximate cause of the injury, it is of no moment that this negligence constituted a breach of some contractual duty. The *Walker* case has been hostilely criticized in the law reviews. See 62 Yale L. J. 111; 65 Harv. L. Rev. 1238.

pany whose employee had obtained a judgment against the shipowner, held that maritime law does not permit contribution among joint tortfeasors in non-collision cases. Since appellant's action against Bronx Towing would first require a jury finding in the wrongful death action that appellant had in some manner breached its duty toward Dunbar, the district court reasoned that *Halcyon* denied appellant any indemnity unless there was an implied exception to the *Halcyon* doctrine in favor of a shipowner whose negligence was merely passive; and, moreover, even if there were such an exception, the exception would not benefit appellant because the complaint in the wrongful death action alleged that appellant was actively negligent.

We hold that the district court erred in dismissing the third-party action. In *Ryan Co.* v. *Pan-Atlantic Corp.*, 350 U. S. 124 (1956) it was held that, notwithstanding *Halcyon*, there was an implied warranty of safe stowage in the stevedoring company's contract with the shipowner, and if the breach of this implied warranty caused the shipowner to become liable to the stevedoring company's employee, the shipowner could maintain an action against the stevedoring company for indemnity based upon that implied warranty. In *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563 (1958) the Court expanded the stevedoring company's implied warranty to include the obligation to use proper equipment. Most recently, in *Crumady* v. *The J. H. Fisser*, 358 U. S. 423, 429 (1959), the Court held that the stevedoring company's "warranty of workmanlike service" imposed liability when the stevedore's negligence brought into play an unseaworthy condition already existing on the vessel. In *James McWilliams Blue Line* v. *Esso Standard Oil Co.*, 245 F. 2d 84 (2 Cir. 1957) we held that the obligation to indemnify for negligent towage was the same as the obligation to indemnify for negligent stowage under the *Ryan* doctrine. Juxtapos-

ing *Crumady* and *McWilliams Blue Line*, it becomes clear that appellant has set forth a cause of action against Bronx Towing by alleging that the unseaworthy condition of the *Trenton* which led to Dunbar's death was brought into play by the negligent manner in which the tug *Cortland* performed its towing operation.

Reversed and remanded for new trial on the third-party complaint. It is ordered that the third-party action be severed from the wrongful death action so that plaintiff's judgment in the latter shall be presently payable.